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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

United States of America,	)	
	)	
Plaintiff,	)	CR 11-1155-TUC-CKJ (JCG)
	)	
vs.	)	<b>REPORT &amp; RECOMMENDATION</b>
	)	
Rodrigo Reichell-Hernandez,	)	
	)	
Defendant.	)	
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Pending before the Court is a Motion to Dismiss Indictment filed by Defendant Rodrigo Reichell-Hernandez on July 27, 2011. (Doc. 60.) Defendant moves for dismissal of the indictment on the ground that the government has destroyed exculpatory evidence in violation of *United States v. Brady*, 373 U.S. 83, 87 (1963) and *Arizona v. Youngblood*, 448 U.S. 51, 58 (1988). According to Defendant, the government improperly destroyed his clothes and his cellular phone. The government filed a response on August 8, 2011. (Doc. 66.) This matter came before the Court for a hearing and a report and recommendation as a result of a referral made on March 4, 2011, pursuant to LRCrim 5.1.

Defendant's Motion was set for evidentiary hearing and evidence was heard on August 24, 2011. Defendant, who is presently in custody, was present and represented by counsel. This matter was submitted following oral argument at the conclusion of the hearing and taken under advisement.

Having now considered the matter, the Magistrate Judge recommends that the District Court, after its independent review, deny Defendant's Motion to Dismiss.

**FACTUAL FINDINGS**

On February 28, 2011, Defendant was arrested and charged with conspiracy to possess

1 with intent to distribute marijuana, in violation of Title 21, United States Code, Section  
2 841(a)(1) and 841(b)(1)(B)(vii). Defendant was apprehended with three other individuals  
3 after agents observed a group of eight suspected narcotics smugglers in a remote  
4 mountainous area. A helicopter crew had a visual of the suspects and tracked them with a  
5 spotlight as they ran. Border Patrol Agents, including Agent LaTourneau, responded to the  
6 scene and were able to apprehend four individuals, including Defendant. The area where the  
7 suspects were apprehended was a rough, mountainous area, filled with rocks, cacti, washes  
8 and dirt, located approximately three miles north of the border. The agents had to travel over  
9 three mountains and some hills to get to the location. Agent LaTourneau described the area  
10 as treacherous and testified that it was not an easy walk. The area was twelve to thirteen  
11 miles east of the nearest hard top road and seven tenths of a mile from the nearest dirt road.

12 Agent LaTourneau testified that when he arrived at the location he could see the  
13 Defendant in the helicopter spotlight, laying face down on the ground. Defendant was  
14 wearing a dark maroon polo shirt with white stripes, jeans and newer Nike tennis shoes; he  
15 had a sweatshirt tied around his waist. Agent LaTourneau testified that it is not uncommon  
16 for people to shed clothing while running away. Near where the suspects were apprehended,  
17 agents found five marijuana bundles and two bundles containing food and supplies.

18 Agent LaTourneau believed that the four individuals who were apprehended knew  
19 each other as evidenced by their interactions and body language. He testified that they  
20 seemed comfortable around each other. He directed them not to speak to each other, but they  
21 did speak to each other in Spanish. During the entire time that Agent LaTourneau was in  
22 contact with the Defendant, the Defendant never denied being part of the group.

23 After his apprehension, Defendant was taken to the Ajo Border Patrol Station for  
24 processing. Agent LaTourneau transported all of the Defendant's property and Defendant  
25 to the Ajo station. Agent LaTourneau recalled the Defendant having a black backpack  
26 similar to a school backpack. Agent LaTourneau, who had searched the Defendant, does not  
27 recall him having a cellular phone. Agent LaTourneau is not involved in evidence issues.  
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1 He did not know if anything in Defendant's possession could have been used for evidence.  
2 He took everything to the station.

3 At the Ajo station, Defendant was read his rights and waived them, agreeing to speak  
4 with agents. Agent Patrick Kindle testified that the Defendant first denied involvement in  
5 marijuana smuggling. Defendant said that he had crossed illegally into the United States on  
6 February 28, between 4:00 and 5:00 pm with a group of eight other individuals who were all  
7 carrying their own backpacks and personal food. After Agent Kindle asked Defendant to tell  
8 the truth, Defendant began to cry and he said that he had carried a bundle filled with food for  
9 the rest of the group which was carrying marijuana. During the interview, the Defendant  
10 never recanted the admission.

11 Agents confiscated Defendant's clothing. The clothing was bagged and all of  
12 Defendant's possessions were listed on CBP Form 6051. Agent Kindle did not believe that  
13 Defendant's clothing or belongings could exculpate the Defendant. Agent Kindle did not  
14 take photographs of the clothing.

15 Defendant was made aware of and acknowledged the possibility of destruction of his  
16 property. Defendant, who reads Spanish, admitted that on March 2, 2011, he signed an  
17 "abandonment form." The form notifies the signer that he may request the return or release  
18 of the property. Bold print on the form provides: **Your request must be made with our**  
19 **office within 30 days from the date of your receipt of this letter.** At the hearing, the  
20 Defendant testified that he had been told that his property would be destroyed in thirty days.

21 At the evidentiary hearing, the Defendant also testified as to how he came to the  
22 location where he was found on February 28. His testimony was contrary to the information  
23 he had provided to Agent Kindle at the Ajo Border Patrol Station. The Defendant testified  
24 that he had been in Phoenix staying at the house of and providing electrical work for a person  
25 whose name he did not know. He decided to go back to Mexico after fifteen days. He took  
26 a shuttle and asked to be dropped off on the highway just north of the border with another  
27 man whose name he did not know. He did not take any suitcases or supplies with him to  
28 Phoenix.

1 The shuttle left around 5pm Monday, February 28, and three to four hours later, at his  
2 request, dropped him off along State Route 85. He did not know which mile marker he was  
3 dropped at or how far he was from the border at the point of drop off. He did not know how  
4 to get to the border. The Defendant testified that the unknown man he was with knew how  
5 to get to the border and the Defendant planned to follow him. They walked in the desert for  
6 approximately four hours. It was dark. The Defendant ran into rocks and dust and cacti. By  
7 the time Border Patrol arrived, it was 3:00 a.m.

8 Defendant testified that he had a cell phone with him, but was unable to make calls  
9 in the United States because it was a Mexican cell phone. He testified that the clothing he  
10 was wearing was newer and that he had purchased it in Phoenix. Defendant contended that  
11 his clothing was clean at the time of his arrest and that he was sitting on a rock, not face  
12 down, when Border Patrol agents found him. He claimed that he did not have a backpack  
13 with him.

14 On March 30, 2011, Defendant was indicted on two counts: conspiracy to possess  
15 with intent to distribute marijuana and possession with intent to distribute marijuana, in  
16 violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(B)(vii).

17 On May 2, 2011, Defendant set a change of plea hearing before the Magistrate. The  
18 change of plea hearing was subsequently vacated. According to the government, Defendant  
19 did not inquire about his property until sometime after this date. The government has been  
20 informed by agents that Defendant's property was destroyed pursuant to United States  
21 Customs and Border Patrol policy.

## 22 ANALYSIS

23 The suppression by the prosecution of evidence favorable to an accused violates due  
24 process where the evidence is material either to guilt or to punishment, irrespective of the  
25 good faith or bad faith of the prosecution. *See United States v. Brady*, 373 U.S. 83, 87  
26 (1963). The government has a duty to preserve evidence if (1) the evidence is material and  
27 exculpatory in nature, (2) the exculpatory value was apparent before the evidence was  
28 destroyed and (3) the defendant would be unable to obtain comparable evidence by other

1 reasonably available means. *See California v. Trombetta*, 467 U.S. 479, 489 (1984). If,  
2 however, the evidence is not material and exculpatory in nature but is instead “potentially  
3 useful evidence,” a different legal standard applies. *Arizona v. Youngblood*, 488 U.S. 51,  
4 57 (1988). In this second scenario, failure to preserve “potentially useful evidence” does not  
5 violate due process “unless a criminal defendant can show bad faith on the part of the  
6 police.” *See id.* at 58. Thus, the initial inquiry in review of a Motion to Dismiss brought  
7 pursuant to *Brady* is whether the evidence at issue was “material and exculpatory” or  
8 “potentially useful.”

9 Generally, evidence is material and exculpatory if it is clearly favorable to the  
10 accused, such as the confession of a co-defendant, *see Brady*, 373 U.S. at 87, or a victim’s  
11 criminal record supporting a defendant’s claim of self-defense. *See United States v. Agurs*,  
12 427 U.S. 97, 114 (1976). Potentially useful evidence, on the other hand, is evidence that  
13 “could have been subjected to tests, the results of which might have exonerated the  
14 defendant,” such as Breathalyzer samples, *see Youngblood*, 488 U.S. at 57, or seized cocaine.  
15 *See Illinois v. Fisher*, 540 U.S. 544, 546 (2004).

16 Defendant does not articulate whether the allegedly destroyed evidence was material  
17 and exculpatory or potentially useful. Defendant claims generally that the clothing he was  
18 wearing on the date of his arrest was new and unsoiled, and therefore could have been used  
19 to prove that Defendant was not a part of the group that was arrested because that group had  
20 been traveling on foot for a day and a half. Defendant also claims that there were no burlap  
21 fibers on his clothing.

22 To the extent Defendant’s clothes had evidentiary value, it was as potentially useful  
23 evidence. The clothing does not have any extrinsic exculpatory value. Only if the clothing  
24 were inspected, and Defendant’s characterization of the clothing as new and free of burlap  
25 fibers proved to be correct, would it be potentially useful. Similarly, Defendant’s cell phone  
26 would be potentially useful evidence only if, upon examination, it could be determined that  
27 Defendant had not used the phone to communicate with anyone else involved in the alleged  
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1 illegal drug smuggling. Thus, Defendant's motion depends upon the applicability of  
2 *Youngblood* and proof by Defendant that the government destroyed evidence in bad faith.

3 An officer does not act in bad faith unless he or she acts with the purpose of depriving  
4 the defendant of the potentially exculpatory evidence. *See United States v. Barton*, 995 U.S.  
5 935-36 (9<sup>th</sup> Cir. 1993). Mere negligent destruction of evidence does not constitute an act of  
6 bad faith. *See id.* Defendant has failed to make a showing of bad faith on the part of the  
7 government as required by *Youngblood*. As a threshold matter, there is little evidence to  
8 suggest that Defendant possessed a cell phone at the time of his arrest which was  
9 subsequently destroyed. CBP Form 6051A, #791917 does not list a cell phone among  
10 Defendant's possessions.<sup>1</sup> In any event, there is no evidence that the agents knew or should  
11 have known that Defendant's clothing and cell phone had any evidentiary value, particularly  
12 in light of the circumstances of this case. The examination of the Defendant's clothing for  
13 burlap fibers would not be of significant evidentiary value where the Defendant confessed  
14 that he carried supplies, not a burlap pack of marijuana. There was no evidence that the  
15 supplies were contained in a burlap pack. The Defendant's claim that the cleanliness of his  
16 clothes would show that he was not part of the backpacking group does not demonstrate that  
17 the agents should have known the potential evidentiary value of the clothing. Agent  
18 LaTourneau credibly testified that it is not uncommon for backpackers to shed clothes during  
19 their journey. Moreover, the Defendant himself testified that he had in fact walked in that  
20 same dusty desert area over the same hilly, rocky land for almost four hours. His testimony  
21 suggests that one can in fact walk through the desert and not become dirty or that he shed his  
22 clothes as Agent LaTourneau suggested.

23 The fact that the Defendant's property was not immediately destroyed and was made  
24 available to the Defendant is the most compelling evidence that the agents did not act with  
25 the purpose of depriving the Defendant of exculpatory evidence. Defendant received notice  
26 that his property had been preserved but could be destroyed if not claimed within thirty days.

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28 <sup>1</sup>Defendant did testify that he possessed a cell phone. However, his testimony as a whole  
was incredible; therefore, the Magistrate Judge gives it little, if any, weight.

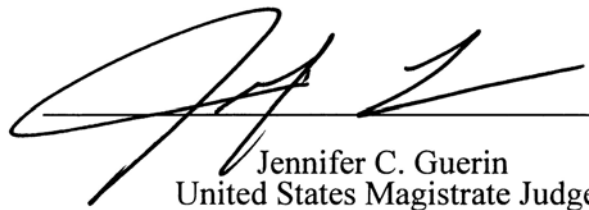
1 Defendant did not inquire about his property until after the date of destruction.<sup>2</sup> If the  
2 agents' purpose was to deprive the defendant of potentially exculpatory evidence, the  
3 evidence would not have been preserved and made available to the Defendant. As there is  
4 no evidence of bad faith on the part of the agents, there can be no due process violation.

5 **RECOMMENDATION**

6 In view of the foregoing, it is recommended that, after its independent review of the  
7 record, the District Court deny Defendant's Motion to Dismiss. (Doc. No. 60.) The parties  
8 have fourteen (14) days to serve and file written objections to the Report and  
9 Recommendation. The parties are advised that any objections should be filed with the  
10 following caption: **CR 11-1155-TUC-CKJ.**

11 DATED this 7<sup>th</sup> day of September, 2011.

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Jennifer C. Guerin  
United States Magistrate Judge

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<sup>2</sup>Defense counsel argues that it was not sufficient for agents to inform the Defendant that his clothing would be preserved for a certain amount of time. Defense counsel suggests that the law should require preservation or that the government should be required to file a notice of its intent to destroy the property so that counsel would be informed as is done in cases involving the destruction of drug contraband. No legal authority was provided in support of these arguments. Given applicable precedent, particularly *Arizona v. Youngblood*, 448 U.S. 51, 58 (1988), the Magistrate Judge finds the arguments unpersuasive.